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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. GARABET TOKHMANIAN, Defendant and Respondent.	B218086 (Los Angeles County Super. Ct. No. BH005581)

APPEAL from an order of the Superior Court of Los Angeles County, Peter Paul Espinoza, Judge. Affirmed.

Edmund G. Brown Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Jennifer A. Neill and Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Appellant.

Marc Elliot Grossman for Defendant and Respondent.

In 1985, respondent Garabet Tokhmanian was convicted of second degree murder with use of a firearm and sentenced to an indeterminate term of 15 years to life in prison, plus 2 years. A panel of the Board of Parole Hearings (Board) has five times found Tokhmanian suitable for parole, and five times the Governor has reversed the Board's suitability finding. On October 23, 2008, Tokhmanian filed a petition for a writ of habeas corpus in the superior court challenging the Governor's most recent decision reversing the Board's suitability finding. The superior court concluded the record did not contain " 'some evidence' " supporting the Governor's decision. Accordingly, it ordered the Governor's decision vacated, the panel's decision reinstated, and Tokhmanian released in accordance with the parole date calculated by the Board.

The warden of the prison where Tokhmanian is incarcerated appeals the trial court's ruling, contending (1) Tokhmanian's petition should be denied as successive, and (2) the proper remedy is remand to the Governor for a new decision. We disagree, and accordingly affirm the superior court's ruling.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The commitment offense.*

We derive the facts of the commitment offense from our unpublished opinion affirming Tokhmanian's conviction. (*People v. Tokhmanian* (B015679, Dec. 1, 1988).) The victim, Oganas Hovick Jabakchurian, was a close friend of Mike Salm, who was staying at Tokhmanian's apartment. On March 25, 1985, Salm asked Tokhmanian if Jabakchurian and his companions could come over and drink champagne. Tokhmanian agreed. Jabakchurian, his brother Vic, and two women arrived at Tokhmanian's residence. Tokhmanian and Jabakchurian became embroiled in a verbal argument regarding why Jabakchurian had not assisted him a few days earlier when Tokhmanian had been in a fight. Vic and Salm prevented the two from engaging in a fistfight. Eventually Tokhmanian told Vic to remove Jabakchurian from the residence. Tokhmanian went to a neighbor's residence and asked for the neighbor's gun. The

neighbor asked if he was crazy. Tokhmanian replied that he would defend himself and would take "full responsibility" for his actions. The neighbor attempted to stop Tokhmanian from taking the gun, and managed to remove several bullets before Tokhmanian grabbed it.

Meanwhile, Vic told Jabakchurian that they should leave. As Jabakchurian and Vic were heading down the apartment building stairs, Tokhmanian shot at them from the top of the stairs, hitting Jabakchurian three or four times in the upper back, torso, and head, killing him.

At trial, Tokhmanian testified that in the two months preceding the murder, Jabakchurian was obnoxious and disrespectful, took his car without permission, and came to Tokhmanian's house with a gun. According to Tokhmanian, Jabakchurian threatened to shoot him.

2. *October 5, 2006 suitability finding.*

Tokhmanian's minimum parole eligibility date was April 18, 1999. At present, he has been incarcerated for over 24 years. Between October 2000 and September 2005, a panel of the Board found Tokhmanian suitable for parole four times. On each occasion, the Governor reversed the Board's suitability finding.

At a fifth parole suitability hearing conducted on October 5, 2006, a panel of the Board once again found Tokhmanian suitable for parole. (*In re Tokhmanian* (2008) 168 Cal.App.4th 1270, 1273.) The information considered by the Board at that hearing was as follows. Tokhmanian had no prior juvenile or adult criminal history other than the commitment offense. He had no history of drug or alcohol abuse. During his years of incarceration, Tokhmanian had never been disciplined for a serious rules violation. He received four custodial counseling chronos for minor misconduct, the last occurring in January 1997. He had never been involved in violent conduct while in prison, and had no gang affiliation. His custody level was "medium-A," the lowest level for a life-term prisoner.

Tokhmanian had no mental health issues and had never been treated for a mental disease. His GAF (global assessment of functioning) score was 95, which was favorable. The psychologist's report prepared for the 2006 hearing was "positive, pro-release," as were prior psychological reports prepared in 2004 and 2000. The 2006 evaluation, as well as earlier evaluations, found circumstantial and psychological factors were prominent in the offense. Tokhmanian did "not display criminal mindedness, nor criminal intent." Although he had attended Alcoholics Anonymous in order to provide personal growth and insight, he was not in need of treatment for substance abuse. The 2006 report rated Tokhmanian as "excellent" in the areas of financial and vocational plans, community support, prior work history, and institutional adjustment. The presiding commissioner noted that he had never before encountered an inmate who had obtained an "excellent" rating in all four categories. Tokhmanian repeatedly expressed remorse for the crime. The psychological report concluded that Tokhmanian was "a viable candidate to live constructively in the community when paroled" and he would pose no greater risk of violence to the community than the average citizen. Additionally, Tokhmanian's correctional counselor wrote a report favoring release.

Tokhmanian was 30 years old when he committed the crime, and was 52 years old at the time of the 2006 hearing. Prior to his incarceration, Tokhmanian was an electrician. He had also become certified as a welder while incarcerated. While in prison, he had participated in a variety of self-help programs including Alternatives to Violence, stress management, and anger management and, according to the psychologist's report, was able to implement the principles learned in those classes in his daily life. Tokhmanian tutored other inmates in Math and beginning English on a daily basis, as needed.

Tokhmanian had "exceptionally strong and stable support from his family, friends and church alliances in the community," and was motivated to lead a constructive life outside prison. He had a job waiting for him in Lebanon, where he was born, should he be deported after his release, as well as in California. He also had the support of his siblings, who lived in California. He had been married to the same woman for 23 years,

predating his incarceration. He maintained a close relationship with his wife, who lived in Pasadena. He had a variety of housing and job offers available, and presented letters of support from various family, church, and community members.

The Board found, for the fifth time, that Tokhmanian was suitable for parole and would not pose an unreasonable risk of danger to society should he be released. In support of its decision, the Board cited Tokhmanian's lack of criminal history, stable social history, prison activities that had enhanced his ability to function within the law, vocational skills, volunteer tutoring, and above average to excellent work evaluations. The Board concluded that because of his maturation, growth, greater understanding, and age, the probability of recidivism was reduced. His parole plans in both the United States and Lebanon were realistic. His institutional behavior had been positive, and he showed signs of remorse. Finally, his psychiatric evaluation was favorable.

3. *Procedural history subsequent to the October 5, 2006 suitability finding.*

The panel's October 5, 2006 proposed decision finding Tokhmanian suitable for parole was reviewed by the Board and reversed during the 120-day review period,[1] on the ground a procedural error occurred, i.e., the murder victim's next of kin had not been given notice prior to the parole hearing as required by Penal Code section 3043. (*In re Tokhmanian, supra,* 168 Cal.App.4th at p. 1273.) Tokhmanian petitioned the superior

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[1] Panel decisions are proposed decisions which are reviewed before their effective date. (Cal. Code Regs., tit. 15, § 2041, subd. (a); *In re Tokhmanian, supra,* 168 Cal.App.4th at p. 1272.) Pursuant to Penal Code section 3041, subdivision (b), "any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final pursuant to this subdivision unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. . . . No decision of the parole panel shall be disapproved and referred for rehearing except by a majority vote of the board, sitting en banc, following a public meeting."

court for a writ of habeas corpus, challenging the propriety of the Board's reversal of the panel's decision. On November 21, 2007, the superior court granted the petition, concluding (1) that the board had failed to comply with Penal Code section 3041's requirement that the disapproval be by a majority vote following a public hearing; and (2) that it was not substantially likely resolution of the panel's legal error (i.e., the failure to provide notice to the victim's next of kin) would have resulted in a substantially different result on rehearing. (*In re Tokhmanian, supra,* at p. 1274.) Accordingly, the trial court vacated the Board's disapproval of the panel's decision and reinstated the panel's October 5, 2006 suitability decision. (*Ibid.*)

Exercising his constitutional authority to review the Board's decisions (Cal. Const., art. V, § 8), on December 20, 2007, Governor Arnold Schwarzenegger reversed the suitability finding solely on the ground the commitment offense was especially atrocious. The Governor acknowledged the numerous positive factors favoring a suitability finding, but concluded they were outweighed by the "gravity of the murder."

On January 9, 2008, Tokhmanian filed a petition for a writ of habeas corpus in the superior court, on the ground that the Governor's decision was not timely. Tokhmanian did not challenge the substance of the Governor's decision. (*In re Tokhmanian, supra,* 168 Cal.App.4th at pp. 1274-1275.) The trial court granted the petition, finding the Governor's decision time-barred, and ordered Tokhmanian's release. (*Id.* at p. 1275.) The warden of the prison where Tokhmanian is incarcerated appealed. In a published opinion, we concluded the Governor's action was timely, and reversed the superior court's order. (*Id.* at pp. 1272, 1275, 1277.)

4. *Current habeas petition.*

On October 23, 2008, Tokhmanian filed in the superior court a second habeas petition challenging the Governor's action; that petition is the subject of the warden's instant appeal. In that petition, Tokhmanian attacked the substance of the Governor's decision, arguing the record did not contain "some evidence" demonstrating he posed a danger if released.

The superior court agreed. It concluded there was some evidence to support the sole factor cited by the Governor, i.e., that the crime was especially heinous, atrocious, and cruel, because it was carried out in a manner demonstrating an exceptionally callous disregard for human suffering and was committed for a very trivial motive. However, the record demonstrated that "[p]etitioner has been violence free for over twenty years, that he shows genuine insight and remorse for his crime and that he has taken great strides to rehabilitate himself while in prison. The record also indicates that [p]etitioner has strong family support and presented viable parole plans. Thus, . . . the circumstances of the commitment offense, when considered in light of the other facts in the record, do not support a finding that [p]etitioner is currently dangerous." Accordingly, on July 15, 2009, the superior court granted the habeas petition, vacated the Governor's December 20, 2007 decision, and reinstated the panel's October 5, 2006 suitability finding. The court ordered Tokhmanian "released in accordance with the parole date that the Board calculated."

The warden filed a timely notice of appeal (Pen. Code, § 1507) and a petition for a writ of supersedeas. We granted the petition and stayed the superior court's July 15, 2009 order, pending further order of this court.

DISCUSSION

1. *Standard of review.*

Because the superior court's decision was based solely upon documentary evidence, we independently review its ruling. (*In re Hyde* (2007) 154 Cal.App.4th 1200, 1212; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677; *In re Lugo* (2008) 164 Cal.App.4th 1522, 1535-1536.)

2. *Applicable legal principles.*

The Board has the power and authority to grant inmates parole. (Pen. Code, § 3040; *In re Masoner* (2009) 179 Cal.App.4th 1531, 1536.) Pursuant to Penal Code section 3041, subdivision (a), the Board shall normally set a parole release date one year prior to an inmate's minimum eligible parole release date, in a manner providing uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public.

(*In re Lawrence* (2008) 44 Cal.4th 1181, 1202; *In re Masoner, supra,* at p. 1536; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1486; *In re Singler* (2008) 169 Cal.App.4th 1227, 1237-1238.) Release on parole is the rule, rather than the exception. (*In re Lawrence, supra,* at p. 1204; *In re Rico* (2009) 171 Cal.App.4th 659, 670; *In re Smith* (2003) 114 Cal.App.4th 343, 351.) A parole release date must be set unless the Board determines that public safety requires a lengthier period of incarceration. (Pen. Code, § 3041, subd. (b); *In re Lawrence, supra,* at p. 1204; *In re Shaputis* (2008) 44 Cal.4th 1241, 1256; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 654; *In re Masoner, supra,* 179 Cal.App.4th at p. 1534 [an inmate "is entitled to be released on parole if he does not currently pose a danger to public safety"].)

In determining suitability for parole, the Board must consider certain factors specified by regulation.[2] (*In re Lawrence, supra,* 44 Cal.4th at p. 1202; Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).) Circumstances tending to establish unsuitability for parole include that the prisoner (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) has a previous record of violence; (3) has an unstable social history; (4) has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison or jail. (Cal. Code Regs., tit. 15, § 2402, subd. (c); *In*

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[2] "Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

re Lawrence, supra, 44 Cal.4th at p. 1202, fn. 7; *In re Rosenkrantz, supra,* 29 Cal.4th at pp. 653-654.)

Circumstances tending to show suitability for parole include that the inmate (1) does not have a juvenile record of assaulting others or committing crimes with the potential of personal harm to victims; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his or her life, especially if the stress built up over a long period; (5) committed the crime as a result of Battered Woman Syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release, or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities suggesting an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d); *In re Lawrence, supra,* 44 Cal.4th at p. 1203, fn. 8; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 654.)

The foregoing factors are general guidelines, and all reliable, relevant information must be considered. (Cal. Code Regs., tit. 15, § 2402, subd. (b); *In re Lawrence, supra,* 44 Cal.4th at p. 1203; *In re Shaputis, supra,* 44 Cal.4th at p. 1257; *In re Gaul* (2009) 170 Cal.App.4th 20, 31.) The overarching consideration is public safety. (*In re Shaputis, supra,* at p. 1254; *In re Lawrence, supra,* at p. 1210; *In re Rico, supra,* 171 Cal.App.4th at p. 671.) "If the inmate is eligible for parole and, in light of all relevant factors, is suitable for parole because he or she does not currently pose a danger to public safety, the inmate must be released on parole." (*In re Masoner, supra,* 179 Cal.App.4th at p. 1536.)

Under article V, section 8, subdivision (b) of the California Constitution and Penal Code section 3041.2, the Governor has the right to review the Board's parole suitability decisions relating to an inmate sentenced to an indeterminate prison term based upon a murder conviction. Although the Governor is required to review the same factors as the Board, the Governor undertakes an independent, de novo review of the inmate's suitability for parole. (Cal. Const., art. V, § 8, subd. (b); *In re Rosenkrantz, supra,* 29 Cal.4th at pp. 660–661; *In re Masoner, supra,* 179 Cal.App.4th at pp. 1536-1537.)

Our review of the Governor's decision is deferential. (*In re Lawrence, supra,* 44 Cal.4th at p. 1204; *In re Shaputis, supra,* 44 Cal.4th at p. 1254; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 665.) "[T]he judicial branch is authorized to review the factual basis of a decision . . . denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*In re Rosenkrantz, supra,* at p. 658; *In re Lawrence, supra,* at p. 1205.) "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence" are matters within the authority of the Board or the Governor. (*In re Rosenkrantz, supra,* at p. 677; *In re Lawrence, supra,* at p. 1204.) "[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports" the decision. (*In re Rosenkrantz, supra,* at p. 677; *In re Shaputis, supra,* at pp. 1260-1261; *In re Lawrence, supra,* at p. 1204; *In re Burdan* (2008) 169 Cal.App.4th 18, 28.)

3. *Tokhmanian's petition is not procedurally barred.*

Preliminarily, we address the warden's contention that Tokhmanian is not entitled to habeas relief because "he presented his contentions piecemeal in successive habeas corpus proceedings." The warden posits that Tokhmanian's January 9, 2008 petition for habeas corpus challenged only the timeliness of the Governor's 2007 decision, and failed to raise the additional ground that the record was devoid of some evidence his release presented a danger to society. The latter claim, the warden complains, was not raised

until Tokhmanian's next petition was filed on October 23, 2008. According to the warden, Tokhmanian "has not, and cannot, justify his failure to challenge both the timeliness and the substance of the Governor's 2007 decision in a single habeas corpus petition." The warden contends Tokhmanian knew the facts underlying both claims at the time he filed the January 9, 2008 petition, and "his subsequent claims are not based on a retroactive change in the law."

We are not persuaded. The warden is of course correct that a habeas petition may be procedurally barred when claims are presented piecemeal in successive petitions. (*In re Clark* (1993) 5 Cal.4th 750, 774.) "[T]he general rule is . . . that, absent justification for the failure to present all known claims in a single, timely petition for [a] writ of habeas corpus, successive and/or untimely petitions will be summarily denied." (*Id.* at p. 797.) However, this rule is not inflexible. (*Ibid*.) "Before considering the merits of a second or successive petition, a California court will first ask whether the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether that explanation justifies the piecemeal presentation of the petitioner's claims." (*Id.* at pp. 774-775.) "[C]laims which are based on a change in the law which is retroactively applicable to final judgments will be considered if promptly asserted and if application of the former rule is shown to have been prejudicial." (*Id.* at p. 775.)

Here, Tokhmanian has presented an adequate explanation for his failure to challenge the substance, as well as the timeliness, of the Governor's decision in a single petition. Tokhmanian's first habeas petition, challenging the timeliness of the Governor's decision, was filed on January 9, 2008. (*In re Tokhmanian, supra,* 168 Cal.App.4th at p. 1274.) The California Supreme Court's decisions in *In re Lawrence* and *In re Shaputis* were not issued until approximately seven months later, on August 21, 2008. (See *In re Lawrence, supra,* 44 Cal.4th 1181; *In re Shaputis, supra,* 44 Cal.4th 1241.) As the warden himself explains in regard to a different point, "At the time of the Governor's decision, the Supreme Court permitted the parole authority to deny parole based on the gravity of the crime alone as long as the factual basis of the

decision was supported by the record." According to the warden, *Lawrence* "changed the standard of judicial review of an executive decision to deny parole based on the crime alone . . . ." Given the warden's arguments, we find his complaint that Tokhmanian's October 23, 2008 petition is procedurally barred somewhat disingenuous. We also observe that prior to *Lawrence* and *Shaputis,* the appellate courts were divided on the question of whether a parole denial would be upheld if there was " 'some evidence' " of the factors cited by the Governor in support of the denial, or whether that evidence also had to demonstrate the prisoner's release would pose an unreasonable risk to public safety. (See *In re Lawrence, supra,* at pp. 1206-1210; *In re Rico, supra,* 171 Cal.App.4th at p. 672.) Prior to *Lawrence* and *Shaputis,* numerous courts had held that if some evidence supported a finding that the crime was especially heinous, atrocious, or cruel, and the record established that the Governor considered the relevant factors, the parole denial would be upheld, even in the absence of a nexus between the various factors and public safety. (*In re Lawrence, supra,* at pp. 1208-1210, and cases cited therein.) Given the unsettled state of the law before clarification by *Lawrence* and *Shaputis,* we believe Tokhmanian has adequately justified his failure to challenge the substance of the Governor's decision in his January 9, 2008 habeas petition.

Moreover, we observe that the mischief created by piecemeal petitions is that they "prevent[ ] the positive values of deterrence, certainty, and public confidence from attaching to the judgment. The values that inhere in a final judgment are equally threatened by petitions for collateral relief raising claims that could have been raised in a prior petition." (*In re Clark, supra,* 5 Cal.4th at p. 770.) We are hard pressed to see how Tokhmanian's filing of a second habeas petition, under the circumstances here, implicates any of these concerns. Likewise, there is no danger that Tokhmanian is attempting to use successive habeas petitions as a means of delay, another reason piecemeal petitions are disfavored (see *id.* at p. 777); to the contrary, his habeas petitions have been brought in an effort to *avoid* further delay in his obtaining release on parole.

Under these circumstances, we reject the warden's argument that the instant petition for a writ of habeas corpus is procedurally barred.[3]

4. *The Governor's decision was not supported by some evidence.*

We turn, therefore, to the merits of the habeas petition. As the warden concedes, the Governor's parole denial was based solely upon the nature of the commitment offense and does not satisfy the "some evidence" standard as clarified by *In re Lawrence.* The warden's concession is appropriate. The nature of the inmate's offense can, by itself, constitute a sufficient basis for denying parole. (*In re Lawrence, supra,* 44 Cal.4th at pp. 1221; *In re Shaputis, supra,* 44 Cal.4th at p. 1255; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 682; see also *In re Scott* (2005) 133 Cal.App.4th 573, 594.) However, "the statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*In re Lawrence, supra,* at p. 1211.) The relevant inquiry is "whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*In re Lawrence, supra,* at p. 1221.) "[A]lthough the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless

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[3] Because we conclude Tokhmanian's petition was not procedurally barred, we need not reach his argument that the warden waived this contention by failing to raise it in the trial court.

the record also establishes that something in the prisoner's pre- or post[-]incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative [to] the statutory determination of a continuing threat to public safety." (*In re Lawrence, supra,* at p. 1214.)

In the instant case, the aggravated nature of the offense does not demonstrate Tokhmanian currently remains a danger to society. The Governor's decision does not articulate a nexus between the facts of the commitment offense and a current risk of dangerousness. The murder was, by all accounts, an isolated incident. It is "both temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur," including Tokhmanian's behavior, programming, accomplishments in prison, parole plans, age, and family support. (See *In re Lawrence, supra,* 44 Cal.4th at p. 1191.) The record is therefore devoid of evidence demonstrating Tokhmanian's release presents an unreasonable risk of danger to society.

5. *Remedy.*

The warden's primary contention on appeal regards the proper remedy. The warden urges that when a gubernatorial parole denial lacks evidentiary support, the proper remedy is remand to the Governor for a new decision consistent with due process.[4] We disagree. As we recently held in *In re Masoner, supra,* 179 Cal.App.4th 1531: "Where, as here, the superior court finds that there is no evidence supporting the Governor's reversal of the Board's decision granting an inmate parole, the superior court has the authority to reinstate the Board's decision without remanding the matter to the Governor." (*Id.* at p. 1534.) Other authorities are in accord. (See *In re Vasquez* (2009) 170 Cal.App.4th 370, 386; *In re Aguilar, supra,* 168 Cal.App.4th 1491; *In re Burdan,*

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[4] We observe that the California Supreme Court has recently granted review in two cases concerning the proper remedy when a court finds that the *Board's* decision denying parole is unsupported by some evidence. (*In re Prather* (Apr. 28, 2009, B211805 [nonpub. opn.]), review granted July 29, 2009, S172903; *In re Molina* (Apr. 16, 2009, B208705 [nonpub. opn.]), review granted July 29, 2009, S173260.)

supra, 169 Cal.App.4th at p. 39; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 257.) Allowing the Governor an unlimited number of reviews of the Board's parole decision would violate a prisoner's due process rights and render the writ of habeas corpus meaningless. (*In re Masoner*, *supra,* at p. 1539.) The writ of habeas corpus provides a critical check on the executive, ensuring that it does not detain individuals except in accordance with the law. (*Hamdi v. Rumsfeld* (2004) 542 U.S. 507, 525; *In re Masoner, supra,* at pp. 1539-1540.) "A prisoner's due process rights cannot exist in any practical sense unless a prisoner can obtain a writ of habeas corpus protecting such rights." (*In re Masoner, supra,* at p. 1540.) Should we adopt the warden's invitation to simply remand the matter to the Governor for yet another determination, Tokhmanian's "due process rights and the writ of habeas corpus would be meaningless under the circumstances of this case because the Governor could arbitrarily detain a prisoner indefinitely, without evidence of the prisoner's current dangerousness and in violation of California law, and the courts would have no practical power to grant the prisoner relief. The rule proposed by [the warden] would entitle the Governor to repeatedly 'reconsider' the release of the prisoner no matter how many times the courts found that there was no evidence that the prisoner was currently dangerous. Such a rule would violate principles of due process and eviscerate judicial scrutiny of the Governor's parole review decisions." (*Ibid.*)

The warden makes several arguments aimed at avoiding this result. None are persuasive. Contrary to the warden's contention, the superior court's remedy of reinstating the Board's decision without remanding to the Governor does not give Tokhmanian "more than the process due." The warden's citation to *In re Carr* (1995) 38 Cal.App.4th 209, *In re Love* (1974) 11 Cal.3d 179, *In re Ruzicka* (1991) 230 Cal.App.3d 595, *In re Bowers* (1974) 40 Cal.App.3d 359, and *In re Castaneda* (1973) 34 Cal.App.3d 825, is unhelpful. The due process violations in those cases involved the alleged failure to provide the inmate with certain documents or with a hearing in the first instance. The appropriate remedy, unsurprisingly, was to provide the paperwork or hearing. (See *In re Love, supra,* at p. 185 [failure to provide inmate with a confidential report before his parole revocation hearing violated due process; remedy was

to provide the report and a new revocation hearing]; *In re Ruzicka, supra,* at pp. 602-604 [failure to provide inmate with a copy of a decision to retain him on parole violated due process; remedy was to provide inmate with a copy of the decision to enable him to pursue an appeal]; *In re Bowers, supra,* at p. 362 [failure to hold prerevocation hearing violated due process; remedy was to order Board to vacate parole revocation decision and conduct the prerevocation hearing]; *In re Castaneda, supra,* at pp. 832-833 [same]; *In re Carr, supra,* at p. 218 [even if decision not to hold annual parole discharge review violated due process, remedy would be to provide annual hearing, not nullification of parole revocation decision].) Here, Tokhmanian has been denied parole without "some evidence" in the record that he remains a danger to society, and simply remanding to the Governor would provide no meaningful remedy. The remedy advocated by the warden amounts to no remedy at all.

The warden also points us to *In re Rosenkrantz, supra,* 29 Cal.4th 616. *Rosenkrantz* explained that if the Board's decision denying parole "is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." (*Id*. at p. 658.) *Rosenkrantz* cited *In re Ramirez* (2001) 94 Cal.App.4th 549, 572, disapproved on other grounds in *In re Dannenberg* (2005) 34 Cal.4th 1061, 1100. In *Ramirez,* the appellate court concluded the Board of Prison Terms had erred by failing to consider the proportionality of an inmate's sentence in relation to the determinate term prescribed for his crimes, or the gravity of his offenses as compared with other, similar offenses. (*In re Ramirez, supra,* at pp. 570, 572.) *Ramirez* further concluded the trial court had erred by "making its own evaluations of the evidence before the Board, and by ordering the Board to set a parole date. In deference to the Board's broad discretion over parole suitability decisions, courts should refrain from reweighing the evidence, and should be reluctant to direct a particular result. [Citation.] The Board must be given every opportunity to lawfully exercise its discretion" over the inmate's parole application. (*Id*. at p. 572.)

Rosenkrantz and *Ramirez*, however, are distinguishable. As we explained in *In re Masoner:* "In this case, the superior court vacated the Governor's, not the Board's, decision. This is a critical difference. 'Although the *Board* can give the prisoner a new hearing and consider additional evidence, the *Governor's* constitutional authority is limited to a review of the materials provided by the Board.' [Citations.] Remanding the matter to the Governor would be an idle act because the Governor has already reviewed the materials provided by the Board and, according to the superior court's unchallenged order, erroneously concluded that there was some evidence in those materials to support a reversal of the Board's decision." (*In re Masoner, supra*, 179 Cal.App.4th at p. 1538.)

The warden additionally urges that remanding to the Governor is "especially crucial in this case due to the intervening change in the law" wrought by *In re Lawrence* and *In re Shaputis.* He argues, "the Governor does not concede that some evidence does not exist under *Lawrence.* All the Governor concedes in this appeal is that his 2007 decision, as written, does not satisfy the more limited some-evidence standard of review announced in *Lawrence* and relied upon by the superior court. The Governor cannot determine whether or not evidence in the record exists to support a parole denial under the *Lawrence* standard because he has not yet had an opportunity to review the record for that purpose." According to the warden, "the Governor's decision was articulated in a way to satisfy the more deferential *Rosenkrantz* standard of review instead of the more limited *Lawrence* standard" and he should be given the opportunity to "correct his decision to meet the proper standards by citing additional evidence to support his decision, or change his decision if the record does not support a parole denial."

This argument would have more force if the record contained any evidence in addition to the nature of the commitment offense that might support a finding Tokhmanian currently presents a risk to society. (See *In re Ross* (2009) 170 Cal.App.4th 1490, 1512-1513.) It does not. To the contrary, the Governor's decision demonstrates

that he, like the Board, viewed all factors other than the nature of the commitment offense as favorable. For example, as positive factors the Governor noted Tokhmanian's lack of criminal record and his discipline-free record in prison; his efforts in prison to enhance his ability to function within the law, including adult education courses, vocational training, and employment in various jobs while incarcerated; his volunteer activities; his receipt of various laudatory chronos; his supportive ties with family and friends; positive remarks made about him by mental health and correctional professionals over the years; and his positive parole plans in both Lebanon and Los Angeles County, including job offers. The Governor also favorably observed that Tokhmanian had availed himself of an array of self-help and therapy.[5] The Governor also noted that in recent years, Tokhmanian had accepted responsibility for his actions and was remorseful, even stating that he deserved his time in prison. In short, the Governor has indicated he considers all factors other than the nature of the commitment offense to be positive. This is not a case in which a variety of evidence besides the nature of the commitment offense could have been relied upon to demonstrate Tokhmanian is currently a danger to society; there simply is no such evidence in the record. Because the record contains no evidence which would support an unsuitability finding, remand would indeed be a futile act.

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[5] Those activities included Alcoholics Anonymous, Narcotics Anonymous, Creative Conflict Resolution, Anger Management, Breaking Barriers, Substance Abuse Program, Espejo, Alternatives to Violence, Rational Behavior Training, Anger Control Group, Communication Skills, Stress Management and Relaxation Training, and religious study courses.

Nor does reinstatement of the Board's decision deprive the Governor of the discretion to determine an inmate's suitability for parole and violate the separation of powers doctrine. As we explained in *In re Masoner*, the remedy ordered by the superior court does not violate the separation of powers doctrine. (*In re Masoner, supra,* 179 Cal.App.4th at p. 1539.) Article III, section 3 of the California Constitution provides that the powers of state government are divided into the legislative, executive, and judicial branches, and persons charged with the exercise of one power may not exercise either of the others, except as permitted by the state Constitution. (*In re Masoner, supra,* at p. 1539.) *In re Rosenkrantz* concluded that judicial review of the Governor's parole decisions under the "some evidence" standard did *not* violate the separation of powers doctrine. (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 667; *In re Masoner, supra,* at p. 1539.) "A necessary component of judicial review is the power of the courts to provide the aggrieved party with a meaningful remedy. The remedy provided here does not infringe on the core functions of the Governor or on the Governor's specific authority to review the Board's parole suitability decisions. As stated, the Governor has already reviewed" the Board's October 2006 decision. (*In re Masoner, supra,* at p. 1539.) In short, the superior court's order did not violate the separation of powers doctrine and provided appropriate relief.

DISPOSITION

The order of the superior court dated July 15, 2009, which granted Tokhmanian's petition for a writ of habeas corpus, reinstated the Board's October 5, 2006 decision, vacated the Governor's reversal of that decision, and ordered Tokhmanian released in accordance with the parole date calculated by the Board, is affirmed. The stay of the superior court's July 15, 2009 order is lifted. In the interests of justice, this opinion is made final as to this court immediately upon its filing. (*In re Dannenberg, supra,* 173 Cal.App.4th at p. 257; *In re Masoner*, *supra*, 179 Cal.App.4th at p. 1541.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.